89-1828

No. _____

Supreme Court, U.S.
FILED
MAY 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

STEPHEN E. KOPCHO,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETER Y. HERCHENROETHER
ALTER, WRIGHT & BARRON
2000 Commonwealth Building
316 Fourth Avenue
Pittsburgh, PA 15222-2002
(412) 281-2211

JAMES R. DUFFY
DUFFY, ISRAEL & SPECTER
1109 Grant Building
Pittsburgh, PA 15219

Counsel for Petitioner,
Stephen E. Kopcho

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. As a matter of law, may a serviceman who is injured while engaging in an activity in the same manner as a member of the general public be barred by the *Feres* doctrine from recovery under the Federal Tort Claims Act?

2. Was *Feres v. United States* wrongly decided and should it be overruled?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING WRIT

I The decision of the Court of Appeals that Petitioner's action is barred because of his duty status and location at the time of his injuries conflicts with the decisions of this Court 8

II The decision of the Court of Appeals is based upon the *Feres* doctrine which was wrongly decided by this Court and should be overruled ... 10

CONCLUSION 12

Appendix A (Opinion of the Court of Appeals) ... 1a

Appendix B (Magistrate's Report and Recommendation adopted as Opinion of District Court) 7a

Appendix C (Memorandum Order of District Court) 17a

Appendix D (Complaint) 19a

Appendix E (Affidavit of Stephen E. Kopcho) 23a

Appendix F (Affidavit of Lieutenant Colonel Alan J. Roach, USMC) 25a

TABLE OF AUTHORITIES

Page

UNITED STATES CASES

Chappell v. Wallace, 462 U.S. 296, 76 L.ed.2d 586, 103 S.Ct. 2362 (1983) 8

Cortez v. United States, 854 F.2d 723 (5th Cir., 1988) 9

Davis v. United States Dept. of Army, 602 F.Supp. 355 (D., Md., 1985) 10

Feres v. United States, 340 U.S. 135, 95 L.ed. 152, 71 S.Ct. 153 (1950) 10, 11

Flowers v. United States, 764 F.2d 759 (11th Cir., 1985) 9

Hass v. United States, 518 F.2d 1138 (4th Cir., 1975) 9

Johnson v. United States, 704 F.2d 1431 (9th Cir., 1983) 7, 9, 10

Loughney v. United States, 839 F.2d 186 (3rd Cir., 1988) 9, 10

Major v. United States, 835 F.2d 641 (6th Cir., 1987), cert. den. 108 S.Ct. 2871 9

Martinelli v. United States, et al, 812 F.2d 872 (3rd Cir., 1987) 10

Mason v. United States, 568 F.2d 1135 (5th Cir., 1978) 9

Parker v. United States, 611 F.2d 1007 (5th Cir., 1980) 10

Peluso v. United States, 474 F.2d 605 (3rd Cir., 1973) 10

Stencel Aero Engineering Corp. v. United States, 431 U.S. 665, 52 L.ed.2d 665, 97 S.Ct. 2054 (1977) 8

TABLE OF AUTHORITIES – Continued

Page

Troglia v. United States, 602 F.2d 1334 (9th Cir., 1979) 10

United States v. Johnson, 481 U.S. 681, 95 L.ed.2d 648, 107 S.Ct. 2063 (1987) 6, 8, 10

United States v. Muniz, 374 U.S. 150, 10 L.ed.2d 805, 83 S.Ct. 1850 (1963) 8

United States v. Shearer, 473 U.S. 52, 87 L.ed.2d 38, 105 S.Ct. 3039 (1985) 7, 8, 9

United States v. Stanley, 483 U.S. 669, 97 L.ed.2d 550, 107 S.Ct. 3054 (1987) 8

Warner v. United States, 720 F.2d 837 (5th Cir., 1983) 9

Woodside v. United States, 606 F.2d 134 (6th Cir., 1979) 10

Zoula v. United States, 217 F.2d 81 (5th Cir., 1955) 9

UNITED STATES STATUTES

Federal Tort Claims Act, 28 U.S.C. §§1346, 2671, et seq. 1, 4

28 U.S.C. §1254(1) 1

28 U.S.C. §2674 2

28 U.S.C. §2680 2

28 U.S.C. §2680(j) and (k) 11

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This is an action under the Federal Tort Claims Act, 28 U.S.C. §§1346, 2671, et seq., for damages resulting from the collision of the Petitioner's truck with military vehicles owned and operated by the Respondent. The Respondent's motion for summary judgment was granted by the District Court upon the recommendation of the Magistrate assigned to the case. The Petitioner, Stephen E. Kopcho, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on March 16, 1990, affirming the judgment of the District Court.

OPINIONS BELOW

The Opinion of the Court of Appeals is not reported. The Opinion is reproduced as Appendix A hereto. The Opinion and Order of the United States District Court for the Western District of Pennsylvania are not reported and appear as Appendices B and C hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 16, 1990. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 410(a) of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2674, provides as follows:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. . . .

Section 421 of the FTCA, 28 U.S.C. §2680, provides as follows:

> The provisions of this chapter and section 1346(b) of this title shall not apply to –
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.
>
> (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

STATEMENT OF THE CASE

Nature of the Case

This is an action under the Federal Tort Claims Act, 28 U.S.C. §§1346, 2671 et seq., for damages resulting from the collision of the Petitioner's truck with military vehicles owned and operated by the Respondent.

Statement of Facts

On or about July 8, 1987, the Petitioner, who at the time was a Lance Corporal in the United States Marine Corps, was driving his personal truck on North Carolina Route No. 172, also known as Sneeds Ferry Road, in a southerly direction. The Petitioner, having completed his assignments and duties for the day, was leaving Camp Lejeune, North Carolina, where he resided in housing provided by the United States Marine Corps, to do various personal errands. He was not required to be on base until the beginning of the next duty day nor advise his superiors of his whereabouts. As such, he was in the same status as a soldier on extended furlough or leave; his time was his own. Complaint, Appendix D and Affidavit of Stephen E. Kopcho, Appendix E.

At about 9:10 p.m., in darkness and with his headlights on, the Petitioner approached a crossing known as TLZ Canary. The Petitioner came up and out of a dip in the road and immediately encountered a truck towing a

105 mm. howitzer which was stationary across the lane of traffic in which he was traveling. The truck and howitzer were in a convoy engaging in "black-out maneuvers" as a part of the training of military personnel at Camp Lejeune. The road had not been marked with signs, flares, reflectors, or lights nor were traffic control personnel positioned to warn or otherwise alert traffic along Route 172. The vehicles in the convoy did not have their headlights or other lights turned on due to the nature of the manuevers. The Petitioner, having no opportunity to stop, collided with the howitzer. Complaint, Appendix D.

Sneeds Ferry Road runs in a north-south direction through Camp Lejeune, North Carolina, and is open for use by the general public. Members of the public are permitted unrestricted travel over the road and do so regularly. Complaint, Appendix D and Affidavit of Stephen E. Kopcho, Appendix E.

As a result of the collision, the Petitioner was thrown from his truck. He suffered a basilar skull fracture, a fractured ankle, multiple lacerations to his knee, elbows, leg and chest, bone damage to his knee, the loss of three teeth and numerous bruises. He has received surgery to correct his ankle, arm and mouth and is expected to have metal plates and screws permanently implanted in his ankle. Three months after the accident he suffered acute post trauma syndrome. He also has permanently lost 50% of his hearing in his right ear. Complaint, Appendix D.

Course of Proceedings

A Complaint in the U.S. District Court for the Western District of Pennsylvania was filed on December 14,

1988. In accordance with local rules of court, the matter was assigned to Chief United States Magistrate Ila Jeanne Sensenich on December 19, 1988. The Respondent filed a Motion to Dismiss and/or a Motion for Summary Judgment on February 24, 1989, based upon the assertion of the *Feres* doctrine as a bar to the Petitioner's recovery. On June 5, 1989, the Chief U.S. Magistrate entered an Order directing that the Respondent's Motion would be treated as a Motion for Summary Judgment and allowed the Plaintiff to file a response by June 26, 1989. On June 21, 1989, the Petitioner filed a Response to the Respondent's Motion, including the Affidavit of Stephen E. Kopcho (Appendix E) as attached.

The Chief U.S. Magistrate filed a Report and Recommendation on August 14, 1989, (Appendix B) wherein she recommended that the Respondent's Motion for Summary Judgment be granted and allowed the parties ten (10) days to file objections. The Petitioner filed Objections on August 16, 1989, including a request for the Court to make a *de novo* determination thereof. On September 15, 1989, U.S. District Judge Alan N. Bloch entered a Memorandum Order granting the Respondent's Motion for Summary Judgment and adopting the Magistrate's Report and Recommendation as the opinion of the Court (Appendix C). On October 31, 1989, the Petitioner filed his Notice of Appeal to the U.S. Court of Appeals for the Third Circuit in accordance with Rule 3(a) of the Rules of Appellate Procedure.

On appeal, the Court of Appeals for the Third Circuit affirmed the District Court Order holding that this Honorable Court in *United States v. Johnson*, 481 U.S. 681

(1987) has "clearly instructed that *Feres* should be interpreted to 'bar *all* suits on behalf of service members against the government based upon service-related injuries.'" Appendix A, p. 4a.

In defining "service-related injuries", it rejected the analysis urged by the Petitioner and applied by the Court of Appeals for the Ninth Circuit in *Johnson v. United States*, 704 F.2d 1431 (9th Cir., 1983) believing that such analysis was inconsistent with the decisions of this Honorable Court, particularly *United States v. Shearer*, 473 U.S. 52 (1985).

In *Johnson*, the Ninth Circuit Court of Appeals held that the issue was " . . . whether the service member on active duty status was engaging in an activity that is related in some relevant way to his military duties." *Johnson v. United States*, 704 F.2d 1431, 1438 (9th Cir., 1983).

In *Shearer* the tort claim which was held to be barred by the *Feres* doctrine concerned an Army Private who was attacked by another serviceman while on an authorized leave *away* from the base. *Shearer* was viewed by the Court of Appeals as an expansion of the *Feres* doctrine as prior cases had not applied the doctrine when the serviceman was "off base" or "on furlough". It concluded that since the Petitioner's injuries occurred *on* a base where he was stationed, his injuries were "service-related" and therefore, his FTCA action was barred by the *Feres* doctrine.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals that Petitioner's action is barred because of his duty status and location at the time of his injuries conflicts with the decisions of this Court.

United States v. Shearer, 473 U.S. 52 (1985), was not decided on the basis of the location of the injury as the Court of Appeals believes. It was based upon the rationale that no claim should be permitted which would detrimentally affect military discipline. In *Shearer*, the claim asserted negligent management by military officers of the serviceman who attacked and killed Private Shearer. The fact that the injury occurred "off base" or while "on leave" was not relevant to this holding. Rather than "expanding" the *Feres* doctrine to injuries occurring "off base" or "on leave", this Honorable Court demonstrated for all Courts of Appeals the need to analyze a tort claim by a serviceman as it relates to the various rationales often stated to support the *Feres* doctrine.

Allowing such claims as were brought in *Shearer* would harm the unique disciplinary structure of the military because they challenge high-level discretionary actions. This has been a consistent concern of this Honorable Court in the application of the *Feres* doctrine. *United States v. Muniz*, 374 U.S. 150 (1963); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 665 (1977); *Chappell v. Wallace*, 462 U.S. 296 (1983); *United States v. Stanley*, 483 U.S. 669 (1987); and *United States v. Johnson*, 481 U.S. 681 (1987).

The application of the *Feres* doctrine simply because of the location or duty status of the injured serviceman

has resulted from an improper analysis of various Supreme Court decisions by the Courts of Appeals. *Loughney v. United States*, 839 F.2d 186 (3rd Cir., 1988); *Cortez v. United States*, 854 F.2d 723 (5th Cir., 1988); *Major v. United States*, 835 F.2d 641 (6th Cir., 1987), cert. den. 108 S.Ct. 2871; *Flowers v. United States*, 764 F.2d 759 (11th Cir., 1985); *Warner v. United States*, 720 F.2d 837 (5th Cir., 1983); *Mason v. United States*, 568 F.2d 1135 (5th Cir., 1978); *Hass v. United States*, 518 F.2d 1138 (4th Cir., 1975); *Zoula v. United States*, 217 F.2d 81 (5th Cir., 1955). This Honorable Court has never applied such tests in determining when a serviceman's injury is "service-related" and these tests interfere with the proper analysis.

By holding that *Johnson v. United States*, 704 F.2d 1431 (9th Cir., 1983) was inconsistent with *United States v. Shearer*, 473 U.S. 52 (1985), the Court of Appeals refused to consider the Petitioner's activity at the time of his injury and limited its review to his location and duty status. In doing so, it failed to consider the rationales used by this Honorable Court to determine the proper application of the *Feres* doctrine.

The location of the serviceman or his duty status may be indications of a service-related injury, but such facts are not the definitive tests used by this Honorable Court. The Court of Appeals considered the facts of the Petitioner's location and duty status at the time of the accident rather than his activity in relation to his military service. As such, its decision was in conflict with the rationales of this Honorable Court in defining the *Feres* doctrine and it is in direct conflict with this Honorable Court's decisions thereunder.

Therefore, this case merits this Honorable Court's review in order to clarify for all Courts of Appeals the

proper analysis to be used in the application of the *Feres* doctrine.

II. The decision of the Court of Appeals is based upon the Feres doctrine which was wrongly decided by this Court and should be overruled.

Since *Feres v. United States*, 340 U.S. 135 (1950) was decided by this Honorable Court, it is clear that the definition of "incident to service" has not been well-stated. Much of the confusion stems from a failure of this Honorable Court to clearly explain why the *Feres* doctrine was established. All of the rationales offered fail to support the conclusion upon close examination. *United States v. Johnson*, 481 U.S. 681 (1987) (dissenting opinion, Scalia, J.)

The passage of nearly four decades during which considerable and able judicial talent have attempted to justify and apply the doctrine has not resolved the underlying discomfort that the doctrine is not clearly defined. *Loughney v. United States*, 839 F.2d 186 (3rd Cir., 1988); *Martinelli v. United States*, 812 F.2d 872 (3rd Cir., 1987); *Davis v. United States Dept. of Army*, 602 F.Supp. 355 (D., Md., 1985); *Johnson v. United States*, 704 F.2d 1431 (9th Cir., 1983); *Parker v. United States*, 611 F.2d 1007 (5th Cir., 1980); *Troglia v. United States*, 602 F.2d 1334 (9th Cir., 1979); *Woodside v. United States*, 606 F.2d 134 (6th Cir., 1979); *Peluso v. United States*, 474 F.2d 605 (3rd Cir., 1973).

Basic statutory construction rules would seem to preclude the need for the *Feres* doctrine. The specific exceptions for military situations in the FTCA acknowledge that other claims by members of the military are possible.

28 U.S.C. §2680(j) and (k). It would seem the silence on the matter of *Feres*-type claims would indicate Congress did not intend to establish such an exception.

Over the years, much has been said about the failure of Congress to overrule *Feres* by statute as an implicit approval of its doctrine. But which is more telling of its intent; the failure to include the doctrine as a specific exception to a law which was enacted to generally waive sovereign immunity for tortious acts, or the failure to address a court decision after the law was enacted? Clearly, Congress' focus was more on the subject matter at the time the Act was being considered and passed than it was years later. Surely Congress' silence at the time the Act was passed is more significant than its silence after an opinion was rendered on the Act thereafter.

The *Feres* doctrine, as announced and applied, has no basis in the FTCA. While it may be proper public policy, Congress is better able to define this policy by statute. The Court should recognize the *Feres* doctrine as an example of good intentions gone awry and directly reverse *Feres v. United States*.

CONCLUSION

Since the decision below is in direct conflict with the analysis used by this Honorable Court for the proper application of the *Feres* doctrine and the *Feres* doctrine itself is unjustified, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

PETER Y. HERCHENROETHER
ALTER, WRIGHT & BARRON
2000 Commonwealth
Building
316 Fourth Avenue
Pittsburgh, PA 15222-2002

JAMES R. DUFFY
DUFFY, ISRAEL & SPECTER
1109 Grant Building
Pittsburgh, PA 15219

Counsel for Petitioner
Stephen E. Kopcho

APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3730

STEPHEN E. KOPCHO,
Appellant

v.

THE UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 88-2712)
District Judge: Hon. Alan N. Bloch

Submitted Under Third Circuit Rule 12(6)
March 12, 1990

Before: SLOVITER, BECKER and STAPLETON,
Circuit Judges
(Filed MAR 16 1990)

MEMORANDUM OPINION OF THE COURT

SLOVITER, *Circuit Judge*

I.

This is an appeal from a final order granting summary judgment to the United States in an action brought against it by an injured Marine under the Federal Tort

Claims Act, 28 U.S.C.A. § 2671-2680 (1989). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

Stephen E. Kopcho, the plaintiff/appellant, was injured when the vehicle he was driving struck a 105 Howitzer attached by a tow hitch to a truck stopped in the road in a military "blackout maneuver." The Howitzer and truck were owned and within the exclusive control and operation of the United States Marine Corps. At the time, Kopcho was on active duty as a Lance Corporal in the Marine Corps, but was "off duty" or "on liberty," driving his personal vehicle on personal errands. The accident occurred within the confines of the military base but on a road open to the public. Kopcho alleged that the Marine Corps intentionally and negligently parked the Howitzer and truck across the highway without lights or other safety warning measures having been taken. Kopcho claimed he suffered personal injuries, pain and suffering, loss of wages, medical expenses, property damage and premature discharge from the military service.

The government filed a motion to dismiss which Magistrate Sensenich, to whom the district court referred the case, notified the parties would be treated as a motion for summary judgment. In her Report and Recommendation, the magistrate reviewed the relevant cases in the Supreme Court and in this court. The magistrate noted that this case is extremely difficult because of the absence of an analogous factual situation. Based, however, on the analysis applied in the Supreme Court opinions, she recommended that summary judgment be granted for the United States under what has become known as the *Feres* doctrine. The district court adopted the Report and Recommendation of the magistrate and accordingly granted

summary judgment. Kopcho appeals. This court has plenary review.

II.

The Federal Tort Claims Act, 28 U.S.C.A. § 2671-2680 (1989), provides a waiver of the federal government's sovereign immunity for tort claims under certain circumstances. In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court construed the Act as excluding injuries arising out of or in the course of activity incident to military service. The Court has enunciated several different rationales behind the *Feres* doctrine, among them, the anomaly of having a soldier's claim depend on where he happened to be stationed at the time, *Feres*, 340 U.S. at 143, the availability of a pre-existing compensation system, *id.* at 144, and the special needs of military discipline, *United States v. Brown*, 348 U.S. 110, 112 (1954).

The Court has recognized that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *United States v. Shearer*, 473 U.S. 52, 57 (1985). Thus in *Shearer* the Court looked at whether the suit required the civilian court to second-guess military decisions and whether the suit might impair essential military discipline. However, in *United States v. Johnson*, 481 U.S. 681 (1987), the Court, reversing the Eleventh Circuit's holding that the *Feres* doctrine did not bar suits where the alleged tortfeasor is not a member of the military, reaffirmed the importance of all three principal rationales. The guiding inquiry remains, however, whether the injuries arose "in the course

of activity incident to service." *Id.* at 692 (quoting *Feres*, 340 U.S. at 146).

This does not mean that the *Feres* doctrine requires individual case analysis in light of its underlying rationales. In *Estate of Martinelli v. United States*, 812 F.2d 872, 874 (3d Cir.), *cert. denied*, 484 U.S. 822 (1987) we reiterated our rejection, originally stated in *Jorden v. National Guard*, 799 F.2d 99, 107-08 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987), of the argument that *Feres* requires us to inquire in each case whether judicial review will unduly interfere with military operations. *Accord Loughney v. United States*, 839 F.2d 186, 188 (3d Cir. 1988) (Supreme Court has "clearly instructed that Feres should be interpreted to 'bar *all* suits on behalf of service members against the Government based upon service-related injuries.' " (*quoting United States v. Johnson*, 481 U.S. at 687-88 (emphasis in original)).

Kopcho argues that the district court erred in relying on "fact-based," "mechanical" tests in reaching its decision; that is, the district court improperly based its disposal of the case on specific factors such as whether Kopcho was on furlough, whether the accident occurred within the boundaries of the military base, and whether he was under orders. He urges rather that the proper test of "incident to service" is that applied by the Ninth Circuit which inquires whether the activity of the plaintiff when the injury occurred was "related in some relevant way to his military duties." *Johnson v. United States*, 704 F.2d 1431, 1438 (9th Cir. 1983).

We are, of course, bound by prior decisions of this court and of the Supreme Court and, to the extent *Johnson*

may be inconsistent therewith, it cannot offer a basis for our decision. In addition, we reject Kopcho's suggestion that an examination of the facts of this case such as that performed by the magistrate amounts to an improper "fact-based" or "mechanical" test.

Kopcho, recognizing that we may also be interested in "fact-based" arguments, notes cases where plaintiffs on formal leaves or furloughs when injured were permitted to bring tort actions against the government, and he argues there is no valid distinction for this purpose between formal leave and liberty, as here. This argument is unavailing, however, since the Supreme Court in *United States v. Shearer*, 473 U.S. 52 (1985), held that the *Feres* doctrine barred a tort claim against the United States for the death of an Army private who was on an authorized leave away from the base. Thus Kopcho's liberty status, a generally shorter and less formal respite from duty than a leave or furlough, does not take him beyond the reach of the *Feres* doctrine. In light of the expansive treatment of the *Feres* doctrine by the Supreme Court, the facts that Kopcho was in military service at the time of injury and that his injuries resulted from an encounter, albeit accidental, with a military "black-out" exercise on the base where he was stationed satisfy the "incident to service" test.

Moreover, although we have expressly rejected any need to apply the *Feres* doctrine rationales in determining whether the *Feres* doctrine bars a case, inasmuch as Kopcho concedes that the lack of lights or warnings was "due to the nature of the maneuvers" and that the maneuvers were "part of the training of military personnel," Appellant's Brief at 4, it appears that taking jurisdiction of this

claim would involve the court in the type of second-guessing of military decisions that is contrary to *Shearer*. Whether our analysis is fact-based or rationale-based, we must conclude that Kopcho's claim is barred by the *Feres* doctrine.

Finally, we note that Kopcho pleaded both negligent and intentional tort. While *Feres* was decided in the context of negligence actions, we held in *Jaffee v. United States*, 663 F.2d 1226, 1234-35 (3d Cir. 1981) (in banc), *cert. denied*, 456 U.S. 972 (1982), that the *Feres* doctrine was equally applicable to intentional torts.

We are sensitive to Kopcho's argument that *Feres* was wrongly decided. As we stated in *Martinelli*, "any relaxation in the *Feres* doctrine must come from Congress." 812 F.2d at 874.

III.

For the foregoing reasons, we will affirm the judgment of the district court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Dolores K. Sloviter
Circuit Judge

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

STEPHEN E. KOPCHO, Plaintiff	)	Civil Action No. 88-2712
vs.	)	Judge Alan N. Bloch/ Magistrate Sensenich
UNITED STATES OF AMERICA, Defendant	)	

MAGISTRATE'S REPORT AND RECOMMENDATION

Sensenich, Chief U.S. Magistrate

Plaintiff brings this action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346, seeking money damages for injuries he sustained in a collision on July 8, 1987, when he was serving on active duty in the United States Marine Corps in the grade of Lance Corporal. He was operating his 1976 Chevrolet pickup truck in a southerly direction along North Carolina Route 172, within U.S. Marine Corps Camp LeJeune, North Carolina, when it collided with a 105 Howitzer attached by tow hitch to a truck, both of which were owned and within the exclusive control and operation of the U.S. Marine Corps, Department of the Navy of the United States of America. He claims the truck and Howitzer had been negligently and intentionally parked across the highway and left without lights or other safety warning measures. Plaintiff alleges that the collision was the direct and proximate consequence of the failure of the members of the Marine Corps to cross Route 172 in a careful and safe manner and to warn persons traveling

along Route 172 of the presence of the truck and Howitzer across the roadway. At the time of the collision plaintiff was on active duty and was in an authorized liberty status. This status was described in an affidavit by Lieutenant Colonel Alan J. Roach as:

> THAT, liberty is an authorized absence granted Marines for short periods to provide respite from the working environment or for other specific reasons, normally commencing at the end of usual working hours on a given day and expiring with the start of normal working hours on the next working day. A liberty period normally does not exceed 72 hours, but a commanding officer may, on limited occasions, specifically authorize a liberty period of 96 hours.

On February 24, 1989, the defendant filed a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure or, in the alternative, pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that plaintiff's action is barred by the doctrine of *Feres v. United States*, 340 U.S. 135 (1950).

This is an extremely difficult case, factually following somewhere between the Supreme Court's decisions in *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918 (1949) and *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153 (1950). *Brooks, supra*, was an action by an injured serviceman and the estate of his brother who was also a serviceman and who was killed when the car in which they were riding on a public highway was struck by a United States Army truck driven by a civilian employee of the Army. The Supreme Court held that the plaintiffs could bring their action under the Federal Tort Claims Act. Significantly, the Court stated:

> [W]e are dealing with an accident which had nothing to do with the Brooks' Army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, . . .

337 U.S. ___, 69 S.Ct. 920.

Approximately a year and a half later the Supreme Court decided *Feres, supra*. That was an action by a serviceman who allegedly was the victim of malpractice by an Army surgeon and the estates of two deceased servicemen, one of whom died in a fire in a barracks and the other of whom allegedly died because of negligence by an Army surgeon. The Court held that these actions could not be brought against the government under the Federal Tort Claims Act. The Court stated:

> The relationship between the Government and members of its armed forces is "distinctively federal in character" . . . the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.

340 U.S. 143-144, 71 S.Ct. 158. The Court noted that adequate compensation is available for servicemen for injuries or death, normally without litigation. The compensation available compares extremely favorably with that provided under most workmen's compensation statutes. The Court distinguished *Brooks, supra*, noting that *Brooks* did not arise out of or in the course of military duty. The plaintiffs in *Brooks* were on furlough, driving

along the highway, under compulsion of no orders or duty and on no military mission. A government owned and operated vehicle collided with them. The Court concluded:

> We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law.

340 U.S. 146, 71 S.Ct. 159.

More recently, *United States v. Shearer*, 473 U.S. 52 (1985), was a Federal Tort Claims Act action by the mother of a deceased private who was kidnapped and murdered by another serviceman. The Court held that the action was barred by the *Feres* doctrine. The Court stated:

> The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases. Here, the Court of Appeals placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions . . . and whether the suit might impair essential military discipline.

473 U.S. 57. The Court distinguished the facts in *Shearer* from *Brooks, supra*, noting that *Brooks* involved the negligent operation of a vehicle while *Shearer* "would require Army officers 'to testify in court as to each other's decisions and actions,' " 473 U.S. 58. It would appear that

Shearer can either be read as broadly extending application of the *Feres* doctrine to incidents occurring away from the base involving two privates who were off duty or could be read narrowly to hold that the *Feres* doctrine applies only to cases where the action requires the court to second-guess military decisions, and might impair discipline, supervision, and control of a serviceman.

In *United States v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987), the Supreme Court held that the *Feres* doctrine precludes an action by a widow of a deceased Coast Guard helicopter pilot who was killed when his helicopter crashed during a rescue mission, allegedly as a result of negligence of controllers of the Federal Aviation Administration (FAA), a civilian agency of the federal government. The tort-feasor's status as a civilian did not preclude application of the *Feres* doctrine. After reviewing the three broad reasons for the *Feres* decision, the Court concluded that the status of the alleged tort-feasor is not critical. The Court noted that "[t]he relationship between the Government and members of its armed forces is 'distinctively federal in character,' " 481 U.S. 689, 107 S.Ct. 2068. The Court concluded that where a service member is injured because of his military relationship with the government, the situs of the alleged negligence should not affect the liability of the government to the serviceman. Rather, the Court noted that it was appropriate for the serviceman to receive such compensation as is provided uniformly for injuries or death to those in the armed services. Next, the Court considered the existence of generous statutory disability and death benefits for servicemen. Finally, the Court noted that actions brought against the government

by service members for injuries incurred incident to service "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness," 481 U.S. 690, 107 S.Ct. 2069. The Court stated:

> Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission.

681 U.S. 691, 107 S.Ct. 2069. Finally, in *U.S. v. Stanley*, 431 U.S. 666, 107 S.Ct. 3054 (1987), the Court applied *Feres, supra*, to an action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court stated:

> A test for liability that depends on the extent to which particular suits would call into question military discipline and decision-making would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decision-making), the mere process of arriving at correct conclusions would disrupt the military regime. The "incident to service" test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.

431 U.S. ___, 107 S.Ct. 3063.

The Court of Appeals for the Third Circuit has recognized the expansive approach of *Feres* in *Estate of Martinelli v. U.S. Dept. of Army*, 812 F.2d 872 (3d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 82, 98 L.Ed.2d 44 (1987), rehearing denied, ___ U.S. ___, 108 S.Ct. 469, 98 L.Ed.2d 408 (1987). The court affirmed an order dismissing the complaint. In that case the plaintiff's son, a member of the United States Army Reserves, died as a result of exposure to noxious gases during his participation as a civilian reserve member in gas chamber exercises. The court held that the *Feres* doctrine bars suits by reservists, although they are civilians, for injuries they receive while on training in military exercises. The court stated:

> Martinelli argues that we should engage in a case-by-case review to ascertain if application of *Feres* is appropriate. However, in *Jordan v. National Guard*, 799 F.2d 99 (3d Cir. 1986), we rejected the argument that *Feres* requires us to inquire in each case whether judicial review will unduly interfere with military operations. Instead, we reaffirmed our view, held as well by the majority of courts, that *Feres is a per se bar of damage actions against the United States and military officers arising out of injuries to military personnel.*

(Emphasis added.) 812 F.2d 874. Significantly, the court noted that attempts by members of the court to limit the *Feres* doctrine had been consistently unsuccessful. The court concluded, "It is therefore evident that any relaxation in the *Feres* doctrine must come from Congress," 812 F.2d 874.

Finally, in *Loughney v. U.S.*, 839 F.2d 186 (3d Cir. 1988), the court affirmed summary judgment for the government. The plaintiff brought the action on behalf of her

husband who became ill while he was on active guard reserve duty in the Pennsylvania National Guard. He was admitted to the United States Army Community Hospital, underwent surgery and went into a coma. He remained comatose. The court noted that the plaintiff claimed that *Shearer, supra,* stood for the proposition that each suit had to be reviewed on a case-by-case basis to determine whether permitting recovery under the facts presented would so undermine military order and discipline as to justify the application of *Feres*. The court stated:

> In a recent decision, the Supreme Court rejected the very arguments that Loughney presents here. *United States v. Johnson,* ___ U.S. ___ . . . The Court reaffirmed each of the three rationales supporting the *Feres* doctrine and clearly instructed that *Feres* should be interpreted to "bar *all* suits on behalf of service members against the Government based upon service-related injuries." . . . *Johnson* confirms the correctness of our previous view that *Feres* prohibits any case-by-case inquiry into whether judicial review of a service member's tort claim would unduly interfere with military operations . . . *It is simply the military status of the claimant that is dispositive.* Thus, since Sergeant Loughney was a "serviceman" and since his "injur[y] ar[o]se out of or [was] in the course of activity incident to service," *Feres,* 340 U.S. at 146, 71 S.Ct. at 159, his wife and guardian is barred from asserting a claim on her husband's behalf against the Government under the FTCA.

(Emphasis added.) 839 F.2d 188.

Although, as was noted, the facts of this case appear to fall somewhere between *Brooks, supra,* and *Feres, supra,* and since neither the Supreme Court or the Court of

Appeals for the Third Circuit have considered an analogous factual situation, this case is extremely difficult. However, in *Estate of Martinelli, supra,* and *Loughney, supra,* the court concludes that the Supreme Court is reading *Feres* expansively. While *Brooks* is similar in that it also involved an automobile accident, it can be distinguished since in that case the accident occurred on a public highway rather than military base and the two servicemen were on furlough, while plaintiff's accident occurred on the military base while he was on active duty and was in an authorized liberty status rather than furlough. The statement in *Shearer,* that the situs of the incident is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, appears to have been used to extend the *Feres* doctrine to incidents occurring off a military base. Since plaintiff was on active duty when the accident occurred; he was on the military base and the collision involved a 105 Howitzer attached to a truck which was owned and was within the exclusive control and operation of the U.S. Marine Corps, it appears that plaintiff's injuries arose out of or were in the course of activity incident to service. Therefore, it is recommended that defendant's motion for summary judgment be granted.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation.

/s/ Ila Jeanne Sensenich
ILA JEANNE SENSENICH
Chief U.S. Magistrate

Dated: August 14, 1989
cc: James R. Duffy, Esquire
Duffy, Israel and Specter
1109 Grant Building
Pittsburgh, PA 15219

Peter Y. Herchenroether, Esquire
Alter, Wright & Barron
2000 Commonwealth Building
316 Fourth Avenue
Pittsburgh, PA 15222

Barbara M. Carlin
Assistant U.S. Attorney
633 U.S. Post Office & Courthouse
Pittsburgh, PA 15219

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

STEPHEN E. KOPCHO, Plaintiff	)	Civil Action No. 88-2712
vs.	)	Judge Alan N. Bloch/ Magistrate Sensenich
UNITED STATES OF AMERICA, Defendant	)	

MEMORANDUM ORDER

On December 19, 1988, this case was referred to Chief United States Magistrate Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(A) and (B), and Rules 3 and 4 of the Local Rules for Magistrates.

The magistrate's report and recommendation, filed on August 14, 1989, recommended that defendant's motion for summary judgment be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all parties on August 16, 1989. Objections were filed by plaintiff's counsel on August 24, 1989. After *de novo* review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 15th day of September, 1989;

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted.

The report and recommendation of Chief Magistrate Sensenich, dated August 14, 1989, is adopted as the opinion of the court.

/s/ Alan N. Bloch
ALAN N. BLOCH
United States District Judge

cc: Ila Jeanne Sensenich
Chief U.S. Magistrate

James R. Duffy, Esquire
Duffy, Israel and Specter
1109 Grant Building
Pittsburgh, PA 15219

Peter Y. Herchenroether, Esquire
Alter, Wright & Barron
2000 Commonwealth Building
316 Fourth Avenue
Pittsburgh, PA 15222

Barbara M. Carlin
Assistant U.S. Attorney
633 U.S. Post Office & Courthouse
Pittsburgh, PA 15219

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

STEPHEN E. KOPCHO, Plaintiff	)	
vs.	)	CA No. 88-2712
THE UNITED STATES OF AMERICA, Defendant	)	

COMPLAINT – CIVIL ACTION

AND NOW, comes the Plaintiff, Stephen E. Kopcho, by and through his attorneys JAMES R. DUFFY and DUFFY, ISRAEL & SPECTER and PETER Y. HERCHENROETHER and ALTER, WRIGHT & BARRON and brings a Civil Action against the UNITED STATES OF AMERICA, Defendant above named, whereof the following is a statement:

STATEMENT OF JURISDICTION

Exclusive jurisdiction of this action by this Honorable Court is based upon 28 U.S.C. § 1346(b).

STATEMENT OF CLAIM

1. The Plaintiff is Stephen E. Kopcho, an individual, residing at 126 N. Third Street, Clairton, Pennsylvania 15025.

2. The Defendant is the United States of America.

3. On or about July 8, 1987 at approximately 9:10 P.M., Plaintiff was operating his 1976 Chevrolet pick-up truck in a southerly direction along North Carolina Route 172 (Sneeds Ferry Road) within U.S. Marine Corps Camp LeJeune, North Carolina in a lawful and prudent manner.

4. At the same date and time, as Plaintiff's vehicle approached a point approximately .2 miles north of TLZ Canary, it collided with a 105 Howitzer attached by tow hitch to a truck, both of which were owned and within the exclusive control and operation of the U.S. Marine Corps, Department of the Navy of the Defendant, United States of America, which truck and Howitzer had been negligently and intentionally parked across the said highway and left without lights or other safety warning measures having been taken.

5. The aforesaid collision was the direct and proximate consequence of the failure of the members of the Defendant's Marine Corps to cross Route 172 in a careful and safe manner and to warn the persons traveling along Route 172 of the presence of the truck and Howitzer across the roadway.

6. As a result of Defendant's intentional and grossly negligent conduct, the Plaintiff was caused to suffer severe and painful personal injury, including but not limited to the following:

A. a basilar skull fracture;

B. a fractured leg;

C. a fractured ankle;

D. permanent bone damage requiring permanent implantation of metal pins and/or staples in the knee and ankle;

E. multiple lacerations of the knee, elbows, leg and chest;

F. injury to the mouth and the loss of three teeth;

G. injury to the ear and auditory nerves resulting in a 50% loss of hearing;

H. numerous contusions and abrasions;

I. acute post trauma syndrome.

7. As a result of the injuries as aforesaid, caused by the conduct of the defendant as aforesaid, the Plaintiff has suffered the following damages:

A. He has in the past and will in the future be required to expend large sums of money for hospitalization, medicine and medical attention, and will be required to undergo further medical treatment;

B. The Plaintiff has suffered a loss of wages and an impairment of earning capacity;

C. The Plaintiff has in the past and will in the future suffer great pain, suffering and inconvenience;

D. The Plaintiff has suffered the loss of and an impairment to his reasonable enjoyment of everyday life;

E. The Plaintiff suffered total destruction of his vehicle;

F. The Plaintiff was prematurely discharged from military service.

8. On or about April 29, 1988, Plaintiff properly presented his claim to the Department of the Navy, being the appropriate Federal agency governing the Marine Corps, in accordance with the Federal Tort Claims Act, 28

U.S.C. § 2675. Said agency has failed to make a final disposition within six (6) months after presentation of the Plaintiff's complaint.

WHEREFORE, Plaintiff prays this Honorable Court enter judgment in his favor and against the Defendant for the damages sustained by him together with counsel fees and all costs of this action as permitted by law.

Respectfully submitted,

/s/ James R. Duffy
James R. Duffy

/s/ Peter Y. Herchenroether
Peter Y. Herchenroether

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

STEPHEN E. KOPCHO, Plaintiff,	)	Civil Action No. 88-2712
vs.	)	Judge Alan N. Bloch/ Magistrate Sensenich
UNITED STATES OF AMERICA, Defendant.	)	

AFFIDAVIT OF STEPHEN E. KOPCHO

AND NOW, this 21 day of June 1989, before me, a Notary Public in and for said County and Commonwealth, personally appeared STEPHEN E. KOPCHO, who, being duly sworn, deposes and says that,

At the time of the accident he had been a member of the United States Marine Corps for 9 months, and he was on "off duty" status operating his personal vehicle on a personal errand to be accomplished off Camp Lejeune, North Carolina. He was not required to perform, nor was he performing, any duties at that time as a member of the United States Marine Corps until the beginning of his next duty day, being 7:00 a.m. July 9, 1987, the following day. He was not required to be on Camp Lejeune until the beginning of his said duty day, nor was he required to advise his superiors of his whereabouts as he was not under any alert. While "off duty", he was not under any restrictions more stringent than those required of any member of the military, on a furlough or other leave of any length of time. North Carolina Route 172, being the road upon which he was driving by the time of the accident, is a public highway, which is used by members

of the general public, without restriction in the same manner as any other public highway. He was then acting in a manner and in a place no different from that permitted by any member of the general public.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

/s/ Stephen E. Kopcho
Stephen E. Kopcho

SWORN TO and subscribed
before me this 21st day
of June, 1989.
/s/ Ann C. Umbel
Notary Public

NOTARIAL SEAL
ANN C. UMBEL, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES MAY 5, 1992

Member, Pennsylvania Association of Notaries

APPENDIX "F"

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

STEPHEN E. KOPCHO, Plaintiff,	)	Civil Action No. 88-2712
v.	)	
THE UNITED STATES OF AMERICA, Defendant.	)	

AFFIDAVIT

AFFIANT, first being duly sworn, states and alleges upon his oath, as follows, to wit:

THAT, I am Lieutenant Colonel Alan J. Roach, United States Marine Corps, presently serving as a judge advocate in the Claims and Tort Litigation Division, Office of the Judge Advocate General, Department of the Navy, 200 Stovall Street, Alexandria, Virginia 22332-2400.

THAT, in this position, I am responsible for maintaining custody of the official Department of the Navy file which contains the records of Stephen E. Kopcho's administrative claim against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401(b), and 2671-80, and have examined the records and materials contained in the that file.

THAT, the records and materials contained in that file establish that on July 8, 1987, Stephen E. Kopcho was serving on active duty in the U. S. Marine Corps in the grade of Lance Corporal (pay grade E-3) and was a

member of Company "A", Headquarters Battalion, Marine Corps Base, Camp LeJeune, North Carolina.

THAT, said records and materials also establish that on the evening of July 8, 1987, at approximately 9:10 P.M., Lance Corporal Kopcho was in an authorized liberty status.

THAT, having been on active duty in the United States Marine Corps since May 1973, having been in an authorized liberty status on many occasions, and having on many occasions authorized liberty for Marines under my control as a commanding officer, I am aware of the meaning of the term "liberty" as it is used in the United States Marine Corps.

THAT, liberty is an authorized absence granted Marines for short periods to provide respite from the working environment or for other specific reasons, normally commencing at the end of usual working hours on a given day and expiring with the start of normal working hours on the next working day. A liberty period normally does not exceed 72 hours, but a commanding officer may, on limited occasions, specifically authorize a liberty period of 96 hours.

FURTHER THE AFFIANT SAYTH NAUGHT.

/s/ A. J. Roach

COMMONWEALTH OF VIRGINIA
CITY OF ALEXANDRIA

BEFORE ME, the undersigned authority, personally appeared this 23rd day of Feb. 1989, Lieutenant Colonel Alan J. Roach, USMC, who, after first being duly sworn,

states that the above and foregoing Affidavit is true and correct to the best of his knowledge and belief.

/s/ Illegible
NOTARY PUBLIC
My Commission Expires:
July 19, 1991